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In the Supreme Court of the United States

OCTOBER TERM, 1955.

No. 842

SIM L. NICHOLS,
Petitioner,

vs.

UNITED STATES STEEL CORPORATION,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

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THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—MAIN 1-6547

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This case involves a suit by the petitioner for alleged breach of contract by the respondent. The only question decided by the Court of Appeals was the question of how the *particular contract involved* should be construed *under the particular facts* disclosed by the evidence *in this case.*

The construction of the contract by the Court of Appeals against petitioner's claim of breach does *not* involve any question of federal law, is *not* in conflict with any decision of any other Court of Appeals or with any decision of this Court, and does *not* fail to follow any applicable Ohio decision or law.

COUNTER STATEMENT OF THE QUESTION PRESENTED.

The *only* question presented is whether the Court of Appeals, in a case in which jurisdiction rests on diversity of citizenship, while applying ordinary common law rules of contract construction to the evidence in this particular case, properly construed the contract, breach of which the petitioner asserted.

STATEMENT OF THE CASE.

Nichols, the petitioner, had been an employee of National Tube Company[1] since 1918. From 1931 until 1949 the Company had enforced non-discriminatory compulsory retirement of all of its employees, at an attained age, which after January 1, 1941, was 65. In May, 1946, petitioner, upon reaching age 65, was retired by the Company in accordance with its compulsory retirement plan.

Beginning in 1937, petitioner was one of the Company's employees represented in collective bargaining by the United Steelworkers of America. In 1937, 1941, 1942 and 1945 the Union negotiated and entered into labor contracts with the Company, covering the terms and conditions of employment of petitioner and others of the Company's employees represented by the Union. Each of these contracts contained prohibitions against *discharge* of its employees by the Company except for cause. *None* of the contracts, however, contained any reference to *retirement*, despite the fact that during the entire period covered by the contracts the Company had continuously maintained and enforced its plan of compulsory retirement with the full knowledge of the Union.

At the time of Nichols' retirement on May 31, 1946, the labor contract of 1945, dated March 13 of that year, was in force and effect. In July, 1950, more than four years after his retirement, Nichols brought this action, alleging that "contrary to the terms and provisions of said contract of March 13, 1945, and on May 17, 1946, the defendant did peremptorily and without first suspending the plaintiff, and without proper cause or legitimate rea-

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[1] After this action was commenced National Tube Company was merged into United States Steel Corporation, which was substituted as party defendant.

son therefor, discharge the plaintiff, effective May 31, 1946." (Amended Complaint, Par. 6; R. 7a.)

The Company denied petitioner's claim. It defended on the ground that petitioner had been retired, not discharged; that petitioner's retirement was in accord with the Company's long established policy of compulsory retirement which had been uniformly enforced without discrimination; that the 1945 contract did not prohibit such retirement; and that the Company therefore had not breached the contract.

THE OPINIONS OF THE COURTS BELOW.

Both the District Court, which tried the case without a jury, and the Court of Appeals, agreed that the case involves simply a question of contract interpretation and construction.

The District Court's analysis was:

> "Stripped of its many seeming technical issues, I think the case comes down to the single question of what rights the plaintiff had as an employee of the defendant under the collective bargaining agreement of 1945 in effect at the time of his compulsory retirement as of May 31, 1946." (Pet. p. 39.)

The Court of Appeals, in turn, put the question:

> "Accordingly * * * we think it is necessary to determine from a consideration of the terms of the contract whether termination of employment by reason of age was prohibited by the contract. * * * *This requires the application of the usual rules involved in the construction of a written instrument.*" (Pet. p. 32.) (Emphasis supplied.)

In their approach to the proper construction of the contract, both courts below were bound by the following legal principles, long well settled in the law of Ohio:

> "The meaning of this instrument should be determined by following the usual and well established rules of construction. The purpose of construction is primarily to determine the intent of the parties." *O'Neill v. German,* 154 Ohio State 565, 570;
>
> "* * * the surrounding circumstances may be proven, not to contradict or vary the terms of the writing but, to enable the court to put itself in the place of the parties the better to understand the terms employed in the writing and to arrive at the mutual intention of the parties." Syllabus in *Merchants National Bank v. Cole,* 83 Ohio State 50;[2]

and

> "while much regard will be given to the clear intention of the parties, yet where the contract is entirely silent as to a particular matter, the courts will exercise great caution not to include in the contract, by construction, something which was intended to be excluded." Syllabus in *East Ohio Gas Company v. The City of Akron,* 81 Ohio State 33.

Here petitioner claimed to have been wrongfully *discharged* in violation of the contract. Neither court below agreed with this claim, the District Court finding:

> "I think there is no question that the word 'discharge' has a different meaning than 'compulsory retirement' and I do not hold that the plaintiff was discharged in the usual and ordinary sense of that term." (Pet. p. 48.)

The District Court, however, read into the contract, by implication, what the Court of Appeals described "as an implied agreement by the Company to abandon the policy" of retirement. (Pet. p. 35). The District Court's

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[2] In Ohio the syllabus is prepared by the members of the Court concurring in the judgment and contains the law of the case, *State, ex rel. Donahey v. Edmondson,* 89 Ohio St. 93, 107, 108.

own words were that "* * * there was no contractual ground upon which to base the forcible termination of the plaintiff's contract. The plaintiff cannot thus be deprived of his right to rely upon the contract as providing the only means by which his employment could be terminated." (Pet. p. 48.)

The District Court disregarded settled Ohio law not only in engrafting this implied provision upon the contract by judicial construction, but also in ignoring or refusing to consider the negotiations, practices, prior contracts, and mutual interpretations thereof and relations thereunder, of the Company and the Union, and other evidence of the background in which they negotiated and agreed upon the contract in suit,[3] merely because petitioner, himself, was not familiar with all of them.

The Court of Appeals disagreed with this approach. As it was bound by Ohio law to do, it reviewed in detail the provisions of the contract and the extensive record disclosing the negotiations, practices, background and conduct of the parties under that contract and similar predecessor contracts, and the Company's concurrent uniform and non-discriminatory enforcement of its established retirement policy throughout the terms of all of said contracts.

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[3] "* * * the matter of notice of or acquiescence in a practiced policy of compulsory retirement is of no consequence. * * * I think all the proffered evidence * * * as to prior and subsequent successive labor contracts containing no restriction upon or mention of the alleged compulsory retirement policy of the Company, and the proffered evidence tending to show the understanding, knowledge and acquiescence of Union leaders or representatives in the retention or reservation of the retirement policy of the Company have limited relevancy; if, indeed, such evidence is relevant at all * * *," etc. (Opinion of District Court, Pet. p. 45.)

After such a review it was forced to conclude that:

> "Against such a background of custom, protests and negotiations it can not be said that the issue of compulsory retirement was inadvertently overlooked in executing the March 13, 1945 contract, or, as we construe the ruling of the District Judge, that the failure to specifically cover the issue in the 1945 contract should be construed as an implied agreement by the Company to abandon the policy." (Pet. p. 35.)

and that:

> "The construction which the parties themselves gave to the 1945 contract strongly supports the conclusion that the contract did not cover the question of retirement for age." (Pet. pp. 34, 35.)

Accordingly, the Court of Appeals, after "application of the usual rules involved in the construction of a written instrument" (Pet. p. 32) concluded that "we find no breach of appellee's contractual rights in enforcing the policy [of compulsory retirement] as to him." (Pet. p. 37.)

ARGUMENT.

In essence, the petition seeks to have this Court probe the entire record, appraise the contract, and determine whether or not the Court of Appeals properly construed the ordinary labor contract here involved.

In an attempt to obtain such a review, petitioner alleges a conflict of decisions. But no amount of ingenious advocacy can obscure the fact that petitioner's position amounts to no more than a claim that the meaning and effect given by the Court of Appeals below to the 1945 labor contract between the National Tube Company and United Steelworkers differs from the meaning and effect given to:

1. A different contract between the Ford Motor Company and the United Protective Workers as that

contract was interpreted in the light of *different* evidence by the Court of Appeals for the Seventh Circuit in *United Protective Workers v. Ford Motor Company*, 194 F. 2d 997 and 223 F. 2d 49.

2. A still *different* contract between the General Electric Company and the Machinists' Union as that contract was interpreted by an Ohio state nisi prius court in the light of still *different* evidence in *International Association of Machinists v. General Electric Company*, 72 Ohio Law Abstract 257.[1]

3. The *different* provisions of a municipal ordinance conflicting with the further *different* provisions of an Ohio state statute dealing with the tenure to be enjoyed by city policemen and firemen as construed by the Supreme Court of Ohio in *State v. Toledo*, 142 Ohio State 123.

Mere *differences* in result among cases arising under *different* facts and different laws fall far short of the *conflict* of decisions contemplated by the rules of this Court.

A. The decision below does not conflict, but is consistent with the decision of the Court of Appeals for the Seventh Circuit in the Ford Motor case.

In *United Protective Workers v. Ford Motor Co.*, 194 F. 2d 997 and 223 F. 2d 49, the plaintiff employee claimed that his alleged compulsory retirement by Ford violated a labor contract between Ford and the United Protective Workers Union. After a second appeal to the Court of

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[1] First reported in the advance sheets of the privately published Ohio Law Abstract on April 23, 1958 (2 weeks after the filing of the petition for certiorari, 3 months after the death on January 28, 1958, of the judge deciding the case, and nearly seven years after the case was decided).

Appeals for the Seventh Circuit, a judgment for the plaintiff was affirmed.

The difference in result between the *Ford* case and this case grows out of *different* contracts negotiated in *different* factual backgrounds, presented to the courts under *different* records and governed by the laws of *different* states. Such a difference does not establish the conflict of decisions which the petitioner asserts or which this Court requires to grant a writ of certiorari. (Cf. *Ruhlin v. N. Y. Life Ins. Co.*, 304 U. S. 202.)

In its opinion the Court below expressed complete agreement with the Court of Appeals for the Seventh Circuit with respect to the legal principles controlling contract interpretation and made it perfectly clear that any differences in result between the two cases were compelled by differences in facts as disclosed by the records, and not by any conflicting views as to law.

That there is no conflict between the decision of the Court of Appeals in this case and that of the Court of Appeals for the Seventh Circuit in the *Ford* case is apparent from the following analysis which the Court below made of the *Ford* case:

> "The Court ruled, and we believe properly so, that the allegations of the complaint that the Ford Company did 'dismiss from its services and terminate the employment of' the plaintiff in violation and breach of the collective bargaining agreement, stated a cause of action. * * * The case was sent back to the District Court to afford the defendant an opportunity to answer the complaint. Following the filing of an answer and a trial in the District Court, the District Judge, in an unreported opinion, ruled that the Ford Company had 'not demonstrated that it designed and employed any uniform retirement plan which might have justified' the plaintiff's dismissal, and gave judgment for

the plaintiff. This ruling was affirmed on the second appeal. We construe the two opinions together as holding that *in the absence of an established, bona fide, uniform retirement plan, the Company could not 'discharge' an employee without cause 'by the simple expedient of saying that the employee had been retired,* and in that manner avoid the consequences of breaching a contract which prohibits discharge except for cause.' 194 Fed. (2d) at p. 1003. We have hereinabove indicated our agreement with such a ruling. *The present case presents a materially different situation,* in that appellee's retirement was in accordance with a well established, bona fide retirement plan, which was found by the District Judge to have been in operation for a number of years prior to the retirement of appellee." (Pet. pp. 37, 38). (Emphasis supplied.)

In short, the decisions of the two Courts of Appeals e entirely consistent, quite apart from the fact, decisive the petition for a writ of certiorari, that the two deci- ns involved different contracts and different factual kgrounds of negotiations, practices, and conduct of the ties underlying their respective contracts.

The decision below does not conflict with the decision of the Ohio State Nisi Prius Court in the General Electric case.

In *International Association of Machinists v. General ctric Co.,* 72 Ohio Law Abstract 257, the trial judge ex- ssly limited the scope of his decision by stating:

"* * * the jurisdiction of this court extends no farther than the *interpretation* and enforcement of *this particular contract.* It is our sole province to address our attention to this question." (p. 258.) (Emphasis supplied.)

In a brief opinion the trial judge found, contrary to the finding of both the District Court and the Court of Appeals in this case, that "we do not have here a case of retirement. Instead, we have discharge because of age." (p. 258.) This finding was made in the light of an effort by General Electric Company to *originate* a plan of compulsory retirement at a newly acquired plant.

In the instant case, the Court of Appeals had no occasion either to agree or disagree with the decision of the Ohio trial court. Here, the Company was not seeking to initiate a plan of compulsory retirement. Rather, as both the District Court and the Court of Appeals found, it merely sought to enforce a uniform and non-discriminatory plan of long standing, which was well known both to the Company and the Union at the time the labor contract was signed. Moreover, here, both Courts below agreed that petitioner, in fact, was *retired* and not "discharged in the usual and ordinary sense of that term." (Pet. p. 48.)

Here, again, it must follow that mere differences in result between cases involving different contracts between different parties, and arising in quite different factual backgrounds, cannot be claimed to constitute such conflicts in decision as would warrant the granting of a petition for a writ of certiorari.

C. The decision below does not conflict with the decision of the Supreme Court of Ohio in the Toledo case.

In *State v. City of Toledo*, 142 Ohio State 123, the City sought, by municipal ordinance, to terminate the tenure of its policemen and firemen through compulsory retirement. A statute, however, provided, with respect to policemen and firemen, that "tenure * * * shall be *during good behavior* and efficient service; *but* any such officer * * * may be removed for" certain specified grounds enumer-

ated in the statute. The Legislature, in so specifying those grounds for which policemen and firemen might be removed, did not include retirement because of attained age.

In the *Toledo* case, the Supreme Court of Ohio did not have under consideration any question of contractual construction. Rather, it dealt only with the *power* of a municipality to act at all in a field which had been preempted by state legislation. Thus, it stated, "the sole question for determination is the validity of the ordinance. * * * If the respondent city possessed *the power* to enact this ordinance, it is valid." (p. 127, emphasis supplied.)

In deciding that the ordinance was invalid, the Court simply held that when a *state statute* guaranteed to policemen and firemen a lifetime tenure of office, *subject only* to certain exceptions specified by the Legislature, a *municipality* was wholly *without power* to add new and different exceptions to such tenure.

The case has nothing whatever to do with the proper construction of a private contract or the legal rules by which such construction shall be affected. It furnishes no guide and establishes no rules by which a court may determine what the parties to such a contract intended to cover by language used in their fairly negotiated agreement.

In the case decided by the Court below there was no question about the *power* of the parties to contract. The only question to be decided was what was the intendment of the language used by the parties to the agreement in the light of the background in which their contract was laid. The power, or lack of power, of the City of Toledo to terminate the life tenure of its policemen and firemen furnished no aid to the Court below, and certainly could not, in any way, be deemed controlling of its decision.

D. The Petition does not disclose any other basis for a writ of certiorari.

The decision of the Court of Appeals correctly recognized that the Labor Management Relations Act has no bearing whatever on the question of contract interpretation here involved. The decision properly stated that the Act "does not compel the making of any agreement whatsoever * * * nor does it regulate the substantive terms * * * about which an agreement may be reached," or "deprive the Company of its common law right to hire and fire at will until such an agreement was reached." (Pet. pp. 31, 32.) Accord *N. L. R. B. v. Jones & Laughlin Steel Corp.*, 301 U. S. 1; *Williams v. Jacksonville Terminal Co.*, 315 U. S. 386.

The Court of Appeals did not, as the petitioner suggests (Pet. pp. 16-17), misconstrue or misapply the decision of this Court in the *Williams* case. The Court merely used the *Williams* case as an illustrative citation in connection with two of its own conclusions, both of which were correct:

(a) That "failure to reach an agreement [with the Union about compulsory retirement] did not deprive the Company of its common law right to hire and fire" (Pet. p. 32). Accord *N. L. R. B. v. Jones & Laughlin Steel Corp.*, 301 U. S. 1.

(b) *That under the record in this case* "the conclusion seems inescapable that while the Company and the Union were never in agreement about the Company's policy of compulsory retirement, the Union nevertheless recognized that it was not covered by the 1945 contract and was a matter to be included in the collective bargaining negotiations in the future" (Pet. p. 35), just as the *Williams* case recognized that red

caps were not covered by an existing labor contract, but that their inclusion was a matter for agreement through bargaining in the future.

The decision of the Court of Appeals for the Seventh Circuit, in *Inland Steel Co. v. N. L. R. B.*, 170 F. 2d 247, holding that an employer has a duty to bargain with the Union about pensions, is not in point and clearly not in conflict with the decision of the Court below. The Company's duty to bargain is not involved in any way in this case. The petitioner, in his argument, forgets that the Labor Act, in imposing a duty to bargain, specifically provides that such duty carries with it no obligation to agree.

No matter how complicated petitioner may seek to make it, the basic question tendered by the petition is simply one of the proper interpretation of an ordinary labor contract. Whether, and to what extent, the parties intended by their contract to deal with tenure of employment is but an aspect of this problem.[5] By definition a question of general importance can hardly include a mere question of contract interpretation. The contract expired more than nine years ago, a fact which emphasizes the restricted effect of the decision of the Court below. The fact that other suits involving the same contract and question are pending or possible cannot alter the fact that the case presents only a question of the interpretation of a labor contract which expired long ago.

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[5] In deciding this question of construction adversely to petitioner's claim, the Court of Appeals, as it was bound to do, followed Ohio law. The District Court did not. (cf. text in connection with footnotes 2 and 3.)

CONCLUSION.

The decision of the Court of Appeals is correct. It is not in conflict with the decision of any other Court of Appeals or of any Ohio Court. The question of contract interpretation involved is important only to the litigants.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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REPLY BRIEF OF PETITIONER.

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REPLY BRIEF OF PETITIONER.

In respondent's Statement of the Case, it is asserted that the various labor contracts of 1937, 1941, 1942 and 1945 refer to *discharge* but they make no reference to *retirement* despite the fact that the Company *continuously maintained* and *enforced* its plan of compulsory retirement with *full knowledge* of the Union. To this statement, your Petitioner replies:

(1) The evidence is undisputed that the policy of compulsory retirement at age 65 was not adopted until January 1, 1941; it was discontinued in September, 1942 and was not reinstituted until August 18, 1945. *It was not being enforced and maintained on March 13, 1945, when the contract under consideration was executed.* (R. 139a-140a.)*

* The District Court found:

"While there is evidence that the defendant had a somewhat flexible retirement policy from 1931 to 1941, the policy of compulsory retirement at 65 was adopted in 1941. However, it appears to have been suspended, or modified, during the war emer-

(Continued on next page)

(2) While Respondent designates the termination of Nichols' employment as *retirement*, no facts are set forth to demonstrate that he was in fact retired. No facts are stated to refute Nichols' contention that his so-called retirement was merely *discharge in disguise*.*

(3) While it is true that the contract makes no mention of retirement, the Company sought to include a clause providing for compulsory retirement at age 65. The Union rejected it. It was always the Union's position that so long as such clause was not written into the contract, the Com-

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(Continued from preceding page)

gency. Thus, it will be seen that for four or more years of the existence of the alleged inflexible compulsory retirement policy the evidence is that the Company had modified the policy to the extent of rehiring, stripped of rights, employees who had been shortly theretofore retired at 65. If plaintiff was supposed to have had some knowledge or implied understanding of a fixed retirement policy he could not, as it seems to me, be expected to understand that the Company had only temporarily, for the duration of the war emergency, departed from its compulsory retirement policy." (Pet. p. 46.)

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* The District Court found:

"I think there is no question that the word 'discharge' has a different meaning than 'compulsory retirement' and I do not hold that the plaintiff was discharged in the usual and ordinary sense of that term. But his employment was effectively and forcibly terminated without any cause expressed or contemplated by the labor agreement, and in breach of his rights.

"The legal and practical effect of compulsory retirement is the same as a discharge and therefore, as it seems to me, there was no contractual ground upon which to base the forcible termination of the plaintiff's contract. The plaintiff cannot thus be deprived of his right to rely upon the contract as providing the only means by which his employment could be terminated. Inland Steel Company v. National Labor Relations Board, supra; United Protective Workers of America v. Ford Motor Co., 194 F. 2d 997; International Association of Machinists v. General Electric, 24 L. R. R. M. 2527 (Cuyahoga County Common Pleas)." (Pet. p. 48.)

any had no right of compulsory termination of employ-ent because of age 65. (R. 269a-276a.)*

At page 4 of Respondent's brief, a part of the syllabus *Merchants National Bank v. Cole*, 83 Ohio State 50, is uoted; the part quoted would imply that the law of hio is that surrounding circumstances may be shown explain a written contract. The complete syllabus sets rth the correct statement of the law which is something ntirely different: where the written contract is *equivo-l* or *ambiguous*, parol evidence is admissible to explain e writing:

> "*An unlimited guaranty in the absence of words showing that it was intended to be continuing is equivocal*, and the surrounding circumstances may be proven, not to contradict or vary the terms of the writing but, to enable the court to put itself in the place of the parties the better to understand the terms employed in the writing and to arrive at the mutual intention of the parties." (Emphasized portion omitted in respondent's brief.)

In the case at bar, no claim has been made that the ntract is equivocal or ambiguous and therefore parol

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* The District Court found:

"Although MacDonald, a high Union official, in his deposition as somewhat evasive on cross-examination, his statement of the nion's position that *the contract did not justify the retention by e Company of a right to compulsory retirement*, corroborates e position taken by plaintiff's witness Schremp who had orked for the defendant twenty-eight years and also was a ember of the Union Grievance Committee during the years volved in this proceeding, and, as I think, more likely reflects e real position of the Union than that testified to in deposition defense witness Stevens in his notes as to what Philip Murray d him; and Murray's statement in the 1946 Convention came er the event and could not, in my view, be controlling as to e plaintiff's rights—by this I mean the plaintiff's rights under e 1945 contract and not his right to bring suit." (Emphasis rs.) (Pet. p. 47.)

evidence is not admissible to vary its terms. (Pet. pp. 19, 20.)

In the footnote at page 5 of Respondent's brief, there appear excerpts from the Opinion rendered by the District Court which likewise inaccurately reflect the thought of the Court. What the District Court said was this:

> "*If that defense should be sustained,* the matter of notice of or acquiescence in a practiced policy of compulsory retirement is of no consequence.
>
> "*If the foregoing is the right answer I think all the proffered evidence of the defendant* as to prior and subsequent successive labor contracts containing no restriction upon or mention of the alleged compulsory retirement policy of the Company, and the proffered evidence tending to show the understanding, knowledge and acquiescence of Union leaders or representatives in the retention or reservation of the retirement policy of the Company have limited relevancy; if, indeed, such evidence is relevant at all *it must be related to two things which I think would have to be established to make such defense effective: (1) that the knowledge of the Company's retirement policy was brought to the attention of the plaintiff,—through the Company officials or its responsible employees, or through the responsible representatives of the Union Local; (2) that having such knowledge, plaintiff be said to have acquiesced in such policy by continuing as a member of the Union with knowledge that there was nothing in the labor contract protecting him against the right of the Company to enforce its retirement policy.*" (Pet. p. 45.) (Emphasized portion was omitted in Respondent's brief.)

Chief Judge Jones was referring to Respondent's defense that compulsory retirement at age 65 was a common law right reserved to the employer:

> "I had supposed, until now, that a bargaining agreement expressed the complete obligations and

rights of the parties relating to employees, including conditons and tenure of employment, and conditions respecing means for termination of employment; but here it is pressed upon me that any method of terminating employment, such as compulsory retirement, not expressed in the agreement is retained by, or reserved to the Company, and this without notice to or knowledge of the employee, who is, on the contrary, charged with implied knowledge of the reservation. This is, as Professor Lehosky testified, the theory of collective bargaining and the interpretation adopted in arbitration of labor disputes. The defendant's claim that this was the interpretation accepted and aquiesced in by Union leaders and responsible Union representatives again seems to me to be inconsistent with the testimony and evidence of Mr. Hobby in the examples submitted of grievance procedure based upon compulsory retirement. In such cases, the Union representative uniformly supported the employee's claims to relief." (Pet. p. 43.)

At page 6, respondent quotes the court below on the proposition that compulsory retirement was not inadvertently overlooked in executing the March 13, 1945 contract. It was not. The Company sought such clause, the Union rejected the proposal and it was omitted. (R. 278a.)

Nor is there any evidence to support the conclusion of the Cout below that the parties construed the contract as reserving such right to the Company. David MacDonald, president of U.S.A.-C.I.O. International testified that the Union always took the position that the Company had no such right in the absence of a contract clause (R. 276a); he was corroborated by Paul Schremp, president of the Lorain local of the Union for many years (R. 215a).

Respondent's brief at pp. 8-9 quotes from the opinion of the court below construing the *Ford Motor* cases as holding that Ford failed to prove a bona fide retirement plan and distinguishing the instant case from the *Ford* cases on that basis. In so doing the Court below misconstrued the opinions rendered by the Seventh Circuit and by the Illinois District Court. Those courts found that Ford did have a bona fide retirement plan, that Orloski contributed to it, but that it was not a valid or sufficient defense because Orloski was not notified of the *terms* of the retirement plan and specifically of the provision for compulsory retirement at age 65. (Pet. pp. 8-12.)

Respondent's brief at page 10 incorrectly states that District Judge Jones agreed that Nichols was retired. Chief Judge Jones found to the contrary and cited the *General Electric* and *Ford* cases as authority. (Pet. p. 48, footnote * page 2 of this brief.)

Respondent argues that different contracts were involved in the *Ford Motor* case and the *General Electric* case and that therefore those cases have no application. It is true that different contracts were involved but the contracts contained *similar* clauses as to *seniority* and *management* rights. The contracts in those cases, as in the case at bar, were *silent* on the subject of *compulsory retirement* at age 65.

We do not urge that the same contracts were involved; we do urge that the same principles of law were involved in those cases, as in the case at bar. Likewise with the case of *State v. Toledo,* 142 O. S. 123. The principle of law enunciated by the courts in those cases conflicts with the statement of the law made by the Court below in the instant case. It is to resolve those differences as to substantive law that we petition for the certification of this case.

The doctrine of *stare decisis* relates to the settlement of points of law. The parties are different and the facts may vary—but the principle of law remains the same.

To the respondent's contention that this case involves an unimportant question of contract interpretation, we reply that the question involved is not limited to this particular case, but effects the rights of hundreds of thousands of other employees working under existing labor contracts containing similar seniority and management clauses.

The fundamental principle of law running through the cases here involved is of nationwide importance today: Do the seniority clauses of collective bargaining contracts give the worker job security while in good health and able to perform the work, as stated in the contracts, or does the employer retain undisclosed common law rights, such as the right of compulsory termination of employment at age 65, which may be enforced by the employer at such time as he considers opportune?

It is a problem of wide-spread and immediate importance to thousands of workers today whose rights will remain uncertain and unsettled until this Honorable Court determines the conflict resulting from the decision rendered by the Court below which is in direct opposition to the decisions rendered by the Seventh Circuit and the Ohio Courts.

Respectfully submitted,

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31/21

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No. 12,332.

United States Court of Appeals

FOR THE SIXTH CIRCUIT.

UNITED STATES STEEL CORPORATION,
Defendant-Appellant,

vs.

SIM L. NICHOLS,
Plaintiff-Appellee.

MOTION FOR HEARING EN BANC
and
PETITION FOR REHEARING.

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SIM L. NICHOLS,
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MOTION FOR HEARING EN BANC and PETITION FOR REHEARING.

MOTION FOR HEARING EN BANC.

Now comes Sim L. Nichols, Plaintiff-Appellee, and respectfully moves this Court that the following petition for rehearing be heard en banc and that oral argument be permitted upon said petition for rehearing. These requests are made for the following reasons:

1. The majority opinion of the Court appears to have as its basis an erroneous concept of the evidence and of the findings of the trial court on material issues.

2. The majority opinion rendered by this Court appears to have ignored the law of Ohio relating to the decisive issues involved in this case and appears to be in conflict with the law of Ohio upon those issues.

3. The majority opinion in this case appears to be in conflict with the rule stated by the Seventh Circuit on the same questions of law.

4. The questions of law involved are novel and of far reaching importance; there are many other pending ac-

tions in the District Court involving the same issues; further, a clarification of the Court's decision is essential for the proper consideration of those cases by the District Court.

5. The matters involved are of such importance as to require an appeal to the United States Supreme Court in the event of an adverse ruling and, therefore, it is respectfully submitted should be considered by all members of this Court before consuming the time and effort of the Supreme Court.

PETITION FOR REHEARING.

Your Petitioner respectfully submits that he has been aggrieved by the majority opinion of this Honorable Court rendered herein on the 25th day of January, 1956, in the respects hereinafter set forth and prays for a rehearing of this case.

I. The Majority Opinion of the Court appears to have as its basis an erroneous concept of the evidence and the findings of the trial Court on material issues.

The National Tube Company instituted its policy of compulsory retirement at age 65 on January 1, 1941 and suspended the policy in August, 1942. It was not being enforced on March 13, 1945, so that it was in actual operation for only 17 months prior to March 13, 1945, the date of the contract, and was not being enforced on the date the contract was made. *Its terms were never disclosed to the employees or to the Union* (213a, 219a, 220a, 267a). It was secretive and enforced only when it was to the company's advantage (366a).

The company sought unsuccessfully in 1941 and 1942 negotiations to have a clause relating to compulsory re-

tirement at 65 included in the contract. The Union successfully opposed and consistently maintained the position that as long as the company did not have such a clause in the contract, it had no such right (262a, 270a).

It was *not an issue at the time the March 13, 1945 contract* was *negotiated* because it was not then being enforced (389a).

The defendant has urged, and apparently successfully to this Court, that the Union was not opposed to compulsory retirement at 65 but wanted retirement tied to a pension plan. The undisputable facts are to the contrary (262a, 270a). The Union policy was: adequate pension—compulsory retirement shall not be permitted (278a). A pension plan was established on November 11, 1949. Yet, compulsory retirement at age 65 has never been written into the collective bargaining agreement. It was completely abandoned in 1948.

We respectfully submit that this Honorable Court has made findings of fact not supported by the record and has misconstrued the findings of fact made by Chief Judge Jones. We refer to the following:

Chief Judge Jones did not find that "appellee's retirement was in accordance with a well established, bona fide retirement plan." He did not find that there was in existence "a well established, bona fide retirement plan." Nor did he find that the defendant's compulsory retirement plan "had been in operation for a number of years prior to the retirement of appellee." Chief Judge Jones' findings on these matters were:

> "While there is evidence that the defendant had a somewhat flexible retirement policy from 1931 to 1941, the policy of compulsory retirement at 65 was adopted in 1941. However, it appears to have been suspended, or modified, during the war emergency.

Thus, it will be seen that for four or more years of the existence of the alleged inflexible compulsory retirement policy the evidence is that the Company had modified the policy to the extent of rehiring, stripped of rights, employees who had been shortly theretofore retired at 65. If plaintiff was supposed to have had some knowledge or implied understanding of a fixed retirement policy he could not, as it seems to me, be expected to understand that the Company had only temporarily, for the duration of the war emergency, departed from its compulsory retirement policy."

Concerning the viewpoints of labor and management on compulsory retirement, this Honorable Court has found that "no contention was made that such an issue was already covered by the existing section dealing with rights of management." David McDonald, then president of United Steelworkers of America, testified:

"Q. I think you and I might agree for the purpose of this examination only that there is nothing in these contracts, any of them, which specifically says the Company is hereby granted the right to compulsorily retire employees at an attained age? A. That's correct.

Q. Can we not also agree there is nothing in these contracts which specifically restricts the Company to compulsorily retire employees at an attained age? A. I cannot agree with that.

Q. You think the discharge provision restricts them? A. I think the Management clause restricts them—does not grant them the right to retire people.

Q. I have agreed with you that there is no specific grant of the right and I also formally ask you to agree with me that there is no specific restriction. (456) A. I cannot agree with you on that. I contend that by not granting them the right, they did not have the right." (276a.)

Chief Judge Jones' finding was:

> "In any event, by the clearest principles of contract interpretation the general provisions of the management clause could not prevail over specific provisions in the contract relating to tenure of employment. This is true especially in the present case since there was no *effective or satisfactory evidence that the Union and aggrieved employee had agreed to, or acquiesced in, the Company's retirement policy as a management prerogative, or that the parties had so interpreted the agreement by their conduct.*" (Italics ours.) (401a, see also 387a.)

Concerning the disposition of the grievances which were filed under the 1941 and 1942 contracts, this Court makes a finding that they were disposed of favorably to the company's position:

> "During 1941 and 1942, Union representatives meeting with representatives of management unsuccessfully protested the enforcement of the rule by the Company. During 1942, grievances of employees Kordelshi, Byrer and Hermann, based on retirement for age, were disposed of favorably to the Company's policy."

We submit that such a finding is not sustained by the record. That was the opinion expressed by the defendant's witness Hobby, but the testimony of Paul Schremp, president of the Local Union, to the contrary, is substantiated by documentary evidence:

> "Q. So that these grievances became settled at the 4th Step in accordance with Company's position, didn't they?
>
> A. Oh, no, they just laid there because there was no place else to go with them." (Cross Examination, 223a.)

Mr. Schremp explained that under the 1941 and 1942 contracts since the company refused to go to arbitration there

was nothing further that could be done with relation to these grievances (214a). The two contracts are in evidence. The agreement of April 1, 1941 (Defendant's Exhibit F (314a)) provides:

> "Grievances not satisfactorily settled in Step 4 shall, in the absence of mutual agreement in writing to the contrary, be appealed to an impartial umpire to be *appointed by mutual agreement* of the parties hereto." (320a.)

The agreement of September 1, 1942 (Defendant's Exhibit G (323a)) provides:

> "* * * such grievance may be appealed by either party to an impartial umpire to be *appointed by mutual agreement.* * * *" (331a.)

The union requested the selection of an impartial arbitrator and the company refused (Defendant's Exhibit T, 371a). As Mr. Schremp testified, since the company refused to go to arbitration, there was nothing more that could be done with respect to these grievances (214a).

As to the grievances which were filed under the March 13, 1945 contract, there were 32 such grievances filed in 1946 and 1947. In 1950, 26 of these grievances were settled favorably to the employees and the other six were withdrawn (218a, 219a, Plaintiff's Exhibit I, 357a).

This Court found that the 1941-1942 grievances were *disposed* of favorably to the company. The only *disposition* that the record shows to have been made of any of these grievances was in the first four steps of the grievance procedure. In each of these steps, the *disposition* was made by a *plant official.* It is not until arbitration that an impartial person considers the grievance. The company consistently held that the matter was not arbitrable and refused to go to arbitration. We submit that Chief Judge Jones' finding was eminently correct that "The retired

employee had not the slightest chance of remedial consideration * * *."

At page 9 of the Court's opinion, it is held that "'The Company would not be justified in discharging" under certain circumstances. The instant case comes within the terms of this Court's opinion because:

(a) The retirement policy was "enforced in order to effect what was actually a discharge under the guise of retirement." What actual facts exist in the case at bar to constitute a legal or lawful "retirement." Nichols' employment was terminated against his will and without his consent, he received no pension (which is a *sine qua non* of retirement), and the time of ending his employment was without choice on his part. The company's designation of "retirement" as applied to Nichols is absolutely and clearly no more than a "guise" to avoid liability for an actual discharge.

What facts can the Court find in this record to be the basis for finding that Nichols was "actually retired"? The fact that the Company may have retired other employees under its alleged policy, cannot logically be a basis for finding that Nichols was "actually retired" and not "discharged."

(b) The actual facts in connection with Nichols' "discharge" reveal clearly that the "so-called retirement policy" was purportedly enforced when, as supplied to Nichols, it "was in substance merely a subterfuge to avoid its contractual obligation against discharge."

This Court seems to find that the District Judge found that *only* the "end result of discharge and compulsory retirement was the same, namely, termination of employment." Although the District Judge held that "the legal and practical effect" was the same, we submit that he also intended to find and hold that the action taken by the com-

pany with respect to Nichols was a discharge without proper cause within the meaning of the contract.

We respectfully submit that Chief Judge Jones' findings are sustained by the evidence in the record and that the findings made by this Court on these points are not justified by the evidence.

Under Rule 57, findings of fact by the trial court should not be set aside unless clearly erroneous. Chief Judge Jones' findings, we submit, were not clearly erroneous but are substantiated by the record. Furthermore, we raise this question: Can the findings of Chief Judge Jones be clearly erroneous when one judge of this Court would affirm his findings? We respectfully submit this question to this Honorable Court for its consideration as a fundamental challenge of the correctness of this Court's action with reference to the findings of the District Court.

II. The Majority Opinion rendered by this Court appears to have ignored the law of Ohio relating to the decisive issues involved in this case and appears to be in conflict with the law of Ohio upon those issues.

1. The majority opinion rendered in this case revolves around the interpretation of the language of the contract but fails to take into consideration the law of Ohio with respect to the interpretation of such a contract. In the majority opinion, no consideration whatsoever is given to the Ohio law upon the subject although there is, in fact, Ohio law directly in point. This would appear to be in violation of the rule stated in the case of *Erie R. v. Tompkins*, 304 U. S. 64, 82 L. Ed. 1188, 58 S. Ct. 817, 114 A. L. R. 1487 (1938) which makes it mandatory upon the federal courts to follow the local rule in matters of common law. The federal courts must follow the local law in an action

for wrongful discharge based on a collective bargaining agreement. *Transcontinental & Western Air, Inc. v. Koppal*, 345 U. S. 653 (1953).

Essentially the same problem that is before this Court was before the Ohio court in the case of *National Association of Machinists v. Electric Vacuum Cleaner Division, General Electric Company*, 24 L. R. R. M. 2527.

In the *Vacuum Cleaner* case, there was an effective labor contract and during the life of that contract the employer sought to "retire" its male employees, who attained the age of 65 years, the company asserting that it had a common law right to do so and that the contract did not limit that right. The language to be construed in that case was the seniority clause of a collective bargaining contract, which is indistinguishable in language from that in the contract in the case at bar. In that case, the contract set forth specific grounds for discharge. The employer terminated the employment of several employees because they had reached the age of 65. An injunction was sought. The employer contended that termination of employment because of age is not discharge. The Ohio court held otherwise.

That contract provided, as does the contract of March 13, 1945, that continuous service may be terminated if the employee voluntarily quits or is discharged:

> "Article X of the contract provides:
>
> "1. An employee's continuous service with the company shall be terminated:
>
> "A. If an employee leaves voluntarily or is discharged." 24 L. R. R. M. 2527.

The employer's position, as in the case at bar, was that the employee was not discharged:

> "Instead, it is claimed that they are retired."

What does "retire" mean? Does it merely mean termination of employment because of age, or does it connote something more than that? Does it mean termination of employment upon a pension and under a pension plan to which the employee has acquiesced?

Was Nichols retired? Judge Baumann gave careful consideration to the meaning of the word. He said, "Certainly in the popular sense, to retire implies at least part of the motive power creating the resultant situation originated in the persons whose status is changed." He also considered the dictionary meaning of the word:

> "Webster defines retire as follows:
>
> " 'To withdraw from office, a public station, business or the like; as having made a large fortune, he retired.'
>
> "and defines withdraw as:
>
> " 'To disengage or remove oneself.' "

Judge Baumann considered the meaning of the word not only in its popular and technical sense, but also as used in labor relations.

> "In employee-employer relationships some consent by the employee either at the inception or at some time during the course of his employment. It may be participation in a pension plan. It could be by specific agreement. We do not have here a case of retirement. Instead, *we have discharge because of age.*"

We respectfully submit that this Honorable Court in its opinion has not considered whether the elements essential to constitute retirement have been established. Nichols received no pension, he did not know of compulsory "retirement" at 65, he did not acquiesce, the plan was not published.

2. This Court has ruled that, unless the contract specifically prohibits compulsory retirement, such a common law right continues to exist. The *Vacuum Cleaner* case holds diametrically to the opposite:

> "The company asserts that it has a common law right to select its employees as it sees fit, and that the contract does not limit its proposed action."
>
> "We construe this contract to prohibit the termination of continuous service except as specified. 'Expressio unius est exclusio alterius.'"

This Court holds that the omission of a company sought clause permitting compulsory retirement permits the company the right of compulsory retirement nevertheless. The *Vacuum Cleaner* case holds exactly to the contrary:

> "The omission of a company requested clause from the final contract does not weaken this conclusion. The provisions of Article XVI fortify it."

3. At page 6 of the majority opinion, this Court states:

> "Appellee throughout his argument contends that the contract provides that employment could be terminated only for proper cause and that reaching the age of 65 is not proper cause. If the contract so provided, that might well be the end of this case. But we do not find such a provision in the contract."

We humbly submit that the Court has misconstrued the appellee's position. The appellee's position on this matter is stated at pages 47 and 48 of his main brief. The appellee's position, in short, is this: That Nichols' employment can be terminated only in the manner provided in the contract. The seniority clause of the contract, Section 8, guarantees job security as long as the man is able to work and is physically fit; and continuous service is to be

broken only for the grounds specified, including quitting or discharge (288a). It is this seniority clause which specifies the causes for termination of employment. The management clause, Section 10, provides for discharge for proper cause or other legitimate reason. The management clause must be construed in conjunction with the seniority clause. It is the position of the plaintiff that the specific provisions of the seniority clause relating to tenure of employment prevail over the general provisions of the management clause.

Further, that the management clause itself has been and is construed by the Union as prohibiting discharge for reason of age alone.

This was the interpretation made by Chief Judge Jones on the motion to amend the findings and for additional findings (401a).

> "In any event, by the clearest principles of contract interpretation the general provisions of the management clause could not prevail over specific provisions in the contract relating to tenure of employment. This is true especially in the present case since there was no effective or satisfactory evidence that the Union and aggrieved employee had agreed to, or acquiesced in, the Company's retirement policy as a management prerogative, or that the parties had so interpreted the agreement by their conduct." (401a.)

This was the position taken by Judge Baumann in the *Electric Vacuum Cleaner* case:

> "We construe this contract to prohibit the termination of continuous service except as specified. 'Expressio unius est exclusio alterius.' " 24 L. R. R. M. 2527.

The Supreme Court of Ohio clearly disagrees with the conclusion drawn by this Court that discharge and

compulsory retirement at 65 are different things. In the case of *State ex rel. v. Toledo*, 142 O. S. 123, 130, it is stated:

> "By whatever name it may be called, removal or retirement, an ordinance interfering with such tenure is inconsistent with the provisions of the statute and cannot be sustained."

4. The majority opinion ignores the law of Ohio as relates to the effect of claimed custom upon the terms of a written contract. The policy of compulsory retirement at 65 can vary the terms of the written contract only if it reaches the legal status of a custom. Under the law of Ohio, a policy or practice does not reach the status of a custom unless it is *long continued without interruption, known to those affected,* and *peaceably acquiesced in.*

> *Steamboat v. Wayne*, 16 Ohio 513 (1847);
> *Insurance Co. v. Harmer*, 2 O. S. 452 (1853);
> *Krause v. Oscar Daniels Co.*, 61 O. Appeals 337 (1939).

This is the general rule: 5 *Am. Jur.* 267.

The evidence in this case shows that compulsory retirement at age 65 was commenced by The National Tube Company in January, 1941 and discontinued in September 1942 (139a). It was reinstituted on August 18, 1945 (140a). Nichols was discharged on May 18, 1946. So, the policy was *continuously* in effect for only 11 months prior to the time of his discharge. It was not in effect on March 13, 1945 when the contract became effective, nor for 2½ years prior to that date. The record being what it is, we find it difficult to reconcile it with the statement made at page 7 of the majority opinion that *"the evidence shows without question that over a period of years prior to the March 13, 1945 contract, such policy was actually in force*

* * *." We reiterate—on March 13, 1945, the date the contract in issue was negotiated, the policy of compulsory retirement at 65 was not being enforced. Therefore, we humbly submit that the Court's opinion is based upon an erroneous assumption of fact on a very basic factual issue.

In addition to the fact that compulsory retirement at 65 was *not long continued without interruption, it was not known to those affected.* It was the uncontradicted testimony of Nichols that he did not know of such policy (46a) and such was the finding of Chief Judge Jones. Nor was it known to the various other employees who testified that they understood retirement was voluntary upon pension after 25 years service (247a, 250a, 252a, 253a, 256a, 259a).

Nor was it peaceably acquiesced in. It could not be acquiesced in by Nichols because he did not know of it. It *was not acquiesced in by the Union.* See the testimony of Paul Schremp (217a) and David McDonald (278a). That the Union objected to it is apparent from the various grievances filed. The company witness Hobby testified that the Union consistently took the position that compulsory retirement at 65 was in violation of the contract provisions (139a).

5. Even if it be found that compulsory retirement at 65 by the National Tube Company was an established custom, it could not be used to vary the terms of the unambiguous contract.

Cincinnati v. Gas Co., 53 O. S. 278.

This very case and this same principle of law was urged by the appellant's counsel in the case of *National Assn. of Machinists v. Electric Vacuum Cleaner Division, General Electric Company.* The court followed that principle of law and construed the contract within its four-

corners and held that under the ancient doctrine of law, the grounds for termination of employment having been specified in the contract, all other grounds are excluded. Compulsory retirement at 65, not being specified in the contract, the Court ruled it to be an unlawful termination of employment.

It is inescapable that the majority decision of this Honorable Court does not follow the rule of law thus stated by the Ohio Courts.

III. The Majority Opinion is in conflict with the opinions rendered by the Seventh Circuit on the same questions of law.

1. Where a collective bargaining contract between employer and union provides that an employee can be discharged only for cause, and contains no specific provision concerning retirement age, compulsory retirement of an employee at age 65 accomplished termination of employment without just cause in violation of contract. *United Protective Workers and Orloski v. Ford Motor Co.*, 194 F. 2d 997, 223 F. 2d 49.

Ford Motor put into effect a policy of compulsory retirement at 65 in 1945, together with an *annuity plan*, which *was published* and distributed among its employees. *Orloski joined the plan in 1947* but never received a copy of the plan and did not know of its provisions. He was "retired" in 1949.

Ford Motor urged:

(1) A common law right to compulsorily retire employees at 65.

(2) The collective bargaining contract did not cover the matter of compulsory retirement.

(3) An established policy of compulsory retirement at 65.

The District Court ruled in its favor and the Appellate Court reversed.

Ford contended that it had a common law right to adopt the policy of compulsory retirement at age 65:

> "Ford is contending in this Court that it had the common law right to adopt a policy of compulsory retirement of its employees at the age of sixty-five; that it did adopt such a policy; that, pursuant to that policy, Orloski was retired; and that as a part of that policy it entered into a Group Annuity Contract with Equitable." 194 F. 2d 997 at 1002.

In the *Orloski* case, the contract had both a seniority clause and a management clause similar to the clauses in the case at bar:

> "Paragraph (1) of the contract designates the union as the exclusive bargaining agent for the plant protection employees of Ford. Paragraph (14) provides rules and conditions for determination of seniority. By paragraph (16) the parties agree that seniority, after it is determined and posted, shall not be changed without notification to and consultation with the union. Paragraph (22) states six different reasons for which seniority shall be broken, including the employee's quitting or being discharged and the discharge not being reversed through grievance procedure. Paragraph (23) provides that the 'order of layoff and rehiring shall be governed by first, seniority and second, ability,' but that Ford shall consult with the union before deviating from strict seniority. The contract also provides that the right to discharge is the sole responsibility of management but that claims of unjust discharge shall be subject to the grievance procedure." *United Protective Workers of America v. Ford Motor Co.*, 194 F. 2d 997 at 1002.

Ford claimed that Orloski was retired pursuant to its general plan to retire all employees at 65, the termination of Orloski's employment

"* * * Ford now asserts was pursuant to a general plan to retire all employees at the age of sixty-five, a plan which Ford now insists that it had a right to, and did, unilaterally adopt." 194 F. 2d 997, at 1002.

The District Court agreed with Ford's contention and held that since the contract contained no specific provisions for retirement, the complaint failed to state a cause of action.

"The District Court held that the union had the right to bargain collectively with respect to pension and retirement plans and that a provision covering the retirement age 'should be included specifically in the contract'; that, since the contract contained no specific provision concerning retirement age, the complaint failed to state a cause of action * * *." 194 F. 2d 997 at 1003.

Ford urged, as does the National Tube Company, that in the absence of a contract provision, Orloski had no right to be retained in employment. Ford urged that compulsory retirement is not discharge, as does the National Tube Company in the case at bar, but the 7th Circuit disagreed with that contention and held that the phraseology is immaterial, that it is reality that counts—whether you call it termination because of age, or discharge—the man's employment has ceased. That Court's ruling on this subject cannot be reconciled with the holding of this Court that compulsory retirement at age 65 and discharge are, in fact, different things.

"The contract expressly provides that an employee may be discharged only for cause. Compulsory retirement of an employee by his employer accomplishes the same result—the employment is terminated. Certainly the employer may not terminate an employee's employment without cause by the

simple expedient of saying that the employee has been retired, and in that manner avoid the consequences of breaching a contract which prohibits discharges except for cause. A consideration of the contract as a whole convinces us that Ford's contention, that an employee's reaching the age of sixty-five is just cause for discharge within the meaning of the contract, is not tenable." 194 F. 2d 997 at 1003.

The ruling of this Honorable Court on that proposition of law is also in conflict with the decision of the 7th Circuit in the case of *Inland Steel v. N. L. R. B.*, 170 F. 2d 247 (1948):

"We are unable to differentiate between the conceded right of a Union to bargain concerning a discharge, and particularly a nondiscriminatory discharge, of an employee and its right to bargain concerning the age at which he is compelled to retire. In either case, the employee loses his job at the command of the employer; in either case, the effect upon the 'conditions' of the person's employment is that the employment is terminated. * * *"

"The tenure of employment is terminated just as effectively by a discharge for cause as by a dismissal occasioned by a retirement provision. And in both instances alike, the time of the termination of such tenure is determined by the Company. As already shown, a termination by discharge is concededly a matter for collective bargaining. To say that termination by retirement is not amenable to the same process could not, in our judgment, be supported by logic, reason or common sense. In our view, the contention is without merit." at page 252.

2. This Court holds that knowledge or consent on the part of Nichols is unimportant, yet it finds that its opinion is not in conflict with the 7th Circuit. We respectfully submit that the decisions cannot be reconciled. That Court said that in the absence of knowledge of or consent

to the company's policy of compulsory retirement, there is no basis for holding that Orloski waived his right under the collective bargaining agreement to be discharged only for cause. And upon that point of law, *the 7th Circuit cites with approval Chief Judge Jones' opinion in the case at bar,* appearing in 122 F. Supp. 726:

> "The Company argues on several grounds that Orloski was properly retired. First, it claims that he was retired under an established retirement plan in which he was voluntarily participating. However, the only positive evidence in the record indicates that Orloski did not know that the annuity contract between the insurance company and Ford provided for retirement at age 65 and that he did not consent to compulsory retirement. *In the absence of knowledge of or consent to the Company's alleged policy of compulsory retirement, there is no basis for holding that Orloski waived his right,* under the collective bargaining agreement, *to be discharged only* for cause. *Nichols vs. National Tube Co.*, D. C., 122 F. Supp. 726, 732." *United Protective Workers and Orloski v. Ford Motor Co.*, 194 F. 2d 997.

Thus we find the law to be in this amazing state: that the principle of law stated by Chief Judge Jones, that compulsory retirement at 65 could not be binding upon the employee in the absence of notice or knowledge, is the law in the 7th Circuit on the basis of Chief Judge Jones' opinion and that it is not the law in this Circuit which has specifically disapproved that proposition of law stated by Chief Judge Jones.

3. An attempt is made to distinguish the *Orloski* case on the basis of an unreported opinion of Judge Campell to the effect that Ford Motor Company "had not demonstrated that it designed and employed any uniform retirement plan which might have justified Orloski's dismissal."

That opinion must be carefully read. Judge Campbell did not find that there was no plan of compulsory retirement at age 65 at the Ford Motor Co. In fact, he found that there was such a plan, but he found that such a plan did not justify Orloski's dismissal because he was not apprised of the plan. Judge Campbell made findings that Ford Motor had instituted its policy of compulsory retirement on June 21, 1945, and that its plan was published and distributed among its employees; that Orloski joined the plan in 1947; that he did not receive a published copy; that he was discharged in 1949; and further found:

> *"Orloski was never apprised of Ford's intention to dismiss or retire him when he reached his sixty-fifth birthday. Second, it is also clear that neither Orloski nor the union was informed of the provisions of the contract between Ford and Equitable."* (Italics ours.)

It was upon the basis of the above quotation that Judge Campbell proceeded to find:

> "Ford has not demonstrated that it designed and employed any uniform retirement plan which might have justified Orloski's dismissal."

We reiterate, the only reasonable interpretation of Judge Campbell's opinion was that Orloski was not apprised of the plan and, therefore, it did not justify his dismissal. Such was the interpretation given by the Circuit Court of Appeals when that opinion came before it for review.

> "The Company argues on several grounds that Orloski was properly retired. First, it claims that he was retired under an established retirement plan in which he was voluntarily participating. However, the only positive evidence in the record indicates that Orloski did not know that the annuity contract between the insurance company and Ford provided for retirement at age 65 and that he did not consent to

compulsory retirement. In the absence of knowledge of or consent to the Company's alleged policy of compulsory retirement, there is no basis for holding that Orloski waived his right, under the collective bargaining agreement, to be discharged only for cause. *Nichols v. National Tube Co., D. C.*, 122 F. Supp. 726, 732." *United Protective Workers v. Ford Motor Co.*, 223 F. 2d 49, at 51.

Neither Nichols nor the Union was ever informed of the provisions of the company plan of compulsory retirement at 65. The Union knew there was some plan from certain complaints which came to it from members whose employment was terminated because of age 65. Nichols never knew of the plan.

How then can the two cases be distinguished on the facts?

IV. The questions of law involved are novel and of far reaching importance; there are many other pending actions in the District Court involving the same issues; further, a clarification of this Court's decision is essential for a proper consideration of those cases by the District Court.

The novelty of the questions involved in this case is recognized by the Court (Majority Opinion, p. 10). That it involves a consideration of fundamental principles of the law of master and servant is likewise recognized. (Majority Opinion, p. 4). We respectfully submit that, in view of the novelty and importance of the questions, the parties should not be left in doubt as to the findings of the court on either matters of law or of fact. As heretofore pointed out in this brief, much confusion exists. This confusion ought to be eliminated, not only for the protection of the parties in the instant case, but also because of the

fact that there are many other cases involving the same problem now pending in the District Court, and the disposition of those cases will be expedited if this confusion as to law and fact are eliminated.

This Court apparently finds the terms of the contract of March 13, 1945 to be unambiguous, yet it nevertheless has proceeded to vary the terms of that contract on the basis of its finding that the National Tube Company had a long established policy of compulsory retirement at age 65. The Court makes no reference to the law relating to the varying of the terms of an unambiguous contract by parol evidence of custom or otherwise. If it is the intention of the Court to enunciate as a principle of law that an unambiguous contract may be varied by parol evidence of an established custom or practice, then, we submit, such a rule of law would be in conflict with the decision rendered by the Seventh Circuit Court of Appeals in the case of *Anson v. Hiram Walker,* 222 F. 2d 100 (1955):

> " 'The intention of the parties must be found in the language used to express such intention; and if the court finds as a matter of law that the contract is unambiguous, evidence of the intention and acts of the parties plays no part in the decision.' Consequently, the rights and remedies of the parties are to be determined from the plain unambiguous words of the contract upon which suit is brought, unattended by averments of other intentions or contemplations."

It would also conflict with the decision rendered by the United States Supreme Court in the case of *Barnard vs. Kellogg,* 10 Wallace 383, 19 L. Ed. 987:

> "But the learned court below having found that by the custom of dealers in wool in New York and Boston there is a warranty by the seller implied from the fact of sale, that the wool is not falsely packed, and having held Barnard bound by it, the inquiry

arises whether such a custom can be admitted to control the general rules of law in relation to the sale of personal property.

"* * * The proper office of a custom or usage in trade is to ascertain and explain the meaning and intention of the parties to a contract, whether written or in parol, which could not be done without the aid of this extrinsic evidence. It does not go beyond this, and is used as a mode of interpretation on the theory that the parties knew of its existence, and contracted with reference to it. It is often employed to explain words or phrases in a contract of doubtful signification, or which may be understood in different senses, according to the subject-matter to which they are applied. But if it be inconsistent with the contract, or expressly or by necessary implication contradicts it, it cannot be received in evidence to affect it." (p. 990.)

The Court has made no statement in its opinion with relation to the proposition of law presented by the appellee that before an alleged custom can be found to exist there must be proof (a) that it was long continued without interruption, (b) that it was known to those affected, (c) that it was peaceably acquiesced in. There has been no finding by this Court of these essential requirements. Clarification is suggested.

The Court finds that the Union knew that the company was "retiring" employees at 65. Does the Court find that the Union was informed of or knew the terms of the so-called retirement plan? That was the turning point in the *Orloski* case, both the Union and Orloski knew that Ford had a retirement plan. Orloski contributed to it—but they did not know its terms. The Court held that in the absence of such knowledge, Orloski was not bound. It is not clear whether this Court agrees or disagrees with that proposition of law.

And so it is with the other issues of law and fact referred to in this petition—there is doubt and uncertainty as to the findings of fact made and conclusions of law reached, as herein outlined. We respectfully submit, that in the interest of just and orderly procedure, these matters ought to be clarified.

V. Certification Is Suggested.

Involving, as this case does, fundamental questions in labor relations and the law pertaining thereto, and recognizing, as we must, that there is a probable conflict between the thinking of this Honorable Court and that of the Seventh Circuit upon these fundamental propositions, we respectfully submit that this Court ought to consider afresh the merits of the case, and that if it still remains of the opinion heretofore expressed by the majority, then we respectfully suggest that the case ought to be certified to the United States Supreme Court under Rule 37 of the Rules of the United States Supreme Court, for instruction upon the questions and propositions of law involved.

Wherefore, petitioner respectfully urges that a rehearing may be granted, and that upon rehearing the judgment of the District Court be affirmed; or in the alternative, that this case be certified to the Supreme Court of the United States under Rule 37 of that Honorable Court upon the questions and propositions of law involved; and that the mandate of this Court may be stayed pending the disposition of this petition.

Respectfully submitted,

SIM L. NICHOLS,
BY JACOB LEVIN AND ARNOLD S. LEVIN,
His Attorneys.

I, Jacob Levin, of Lorain, Ohio, an attorney regularly admitted to practice in the United States Circuit Court of Appeals for the Sixth Circuit, do certify that in my opinion the foregoing petition for rehearing in the case of United States Steel Corporation vs. Sim L. Nichols, No. 12332, is well founded and is not presented for the purpose of creating a delay.

JACOB LEVIN.

February 10, 1956.